In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1153

FRITZ KYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. Petitioner, a broker of wines and other alcohols, seeks review of a decision of the Court of Claims, dismissing for lack of jurisdiction his suit for a brokerage commission allegedly due him for a sale of "set-aside" industrial alcohol pursuant to a contract which he claims to have made with the Grape Crush Administrative Committee serving Central California. This Committee was an agency of the United States established and controlled by the Secretary of Agriculture under the authority of the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, as amended, 7 U.S.C. 601–624), which seeks to stabilize marketing conditions for various agricultural commodities including grapes. The Committee, composed of grape

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handlers and producers duly appointed by the Secretary (7 U.S.C. 608(c)(7)(C); 7 C.F.R. (1964 ed.) 990.29–990.35), was charged with the administration of Federal Marketing Order No. 990 (7 C.F.R. Part 990) which provided grape volume control regulations for the 1961–1962 and 1962–1963 crop years. As required by the marketing order, a substantial quantity of grapes was set aside in separate surplus pools for each year, to be disposed of for the account of the Committee via outlets which were not competitive with beverage alcohol, with the profits to be divided on a pro rata basis among the grape producers.[1] 7 C.F.R. 990.62(d).

Costs for the administration of the marketing order were taxed directly to handlers and producers in the area, and these funds comprised the Committee's sole source of financing[2] (7 C.F.R. 990.72 (a) and (b)).

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[1] The Grape Crush Administrative Committee was terminated as provided by law in December 1964 (7 U.S.C. § 608(c)(16)). Both surplus pools have now been liquidated and the proceeds, with the exception of a $135,000 fund being held pending the outcome of this case, have been distributed.

[2] Congress specifically provided that such committees should be self-supporting in 7 U.S.C. 610(b)(2)(ii):

"Each order relating to any other commodity or product issued by the Secretary under this chapter shall provide that *each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find are reasonable and are likely to be incurred by such authority or agency, during any period specified by him, for such purposes as the Secretary may, pursuant to such order, determine to be appropriate, and for the maintenance and functioning of such authority or agency*, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. *The pro rata share of the*

The Committee neither received an appropriation of public funds nor was it authorized to obligate appropriated funds.

Petitioner commenced this action against the United States in the Court of Claims after the United States District Court for the Southern District of California dismissed his action against the Grape Crush Administrative Committee, with prejudice, for failure to state a claim upon which relief could be granted (*Kyer* v. *Grape Crush Administrative Comm.*, Civil No. 2508–ND, S.D. California, Order of October 12, 1964).[3] The Court of Claims granted the government's motion to dismiss, holding that its Tucker Act jurisdiction (28 U.S.C. 1491), which encompasses "any claim against the United States founded * * * upon any express or implied contract with the United States," is limited by the provision in 28 U.S.C. 2517 that judgments rendered by the Court of Claims are payable only from appropriated funds. Relying on *G. L. Christian and Associates* v. *United States*, 312 F. 2d 418, 425, certiorari denied, 375 U.S. 954, the court

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expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of the agricultural commodity or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers. The payment of assessments for the maintenance and functioning of such authority or agency, as provided for herein, may be required under a marketing agreement or marketing order throughout the period the marketing agreement or order is in effect and irrespective of whether particular provisions thereof are suspended or become inoperative." (Emphasis supplied.)

[3] The district court did not specify the grounds upon which it granted the motion to dismiss the complaint. No appeal was taken from the district court's order.

ruled that, to be actionable in the Court of Claims, a contract must be one for which public monies could be appropriated. The court concluded that, whether the absence of appropriated funds was "the product of authorized executive discretion or a direct congressional expression" (Pet. App. C–7), there was no basis upon which appropriated funds could be used to pay a judgment in the instant case.

2. The determination of the court below is clearly correct. On the basis of *Standard Oil* v. *Johnson,* 316 U.S. 481, 485, in which this Court pointed out that "the Government assumes none of the financial obligations of" Army post exchanges, it has been consistently held that the contracts of non-appropriated fund agencies are not obligations of the United States. *United States* v. *Holcombe,* 277 F. 2d 143 (C.A. 4); *G. L. Christian and Associates* v. *United States,* 160 Ct. Cl. 1, 312 F. 2d 418, 425, opinion on rehearing, 160 Ct. Cl. 58, 320 F. 2d 345, 351, certiorari denied, 375 U.S. 954; *Borden* v. *United States,* 126 Ct. Cl. 902, 116 F. Supp. 873; *Pulaski Cab Co.* v. *United States,* 141 Ct. Cl. 160, 157 F. Supp. 955; *Gradall* v. *United States,* 161 Ct. Cl. 714, 329 F. 2d 960; *Keetz* v. *United States,* 168 Ct. Cl. 205; *Bailey* v. *United States,* 201 F. Supp. 604 (D. Alaska). This settled principle is applicable here.

In common with post exchanges, the Grape Crush Administrative Committee was plainly a non-appropriated fund instrumentality. As noted above, Congress expressly provided that the operations of the Committee should be financed through assessments against the handlers and producers who participated

in, and benefited from, the grape marketing program. 7 U.S.C. 610(b)(2)(ii). And, in actual fact, no appropiated funds were ever employed in the administration of the program by the Committee.

3. Petitioner stresses (Pet. 12) that, when the Committee was terminated in 1964, not all of the proceeds from the sale of surplus grapes were distributed to the producers. The amount that was withheld as a reserve (see n. 1, *supra*, p. 2) does not, however, belong to the United States. Thus, as the court below recognized (Pet. App. C–7), the fact the Secretary of Agriculture is its custodian does not make the reserve fund subject to a judgment under the Tucker Act.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

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